

Protest of	) Date: June 23, 1987
	)
NATIONAL ELECTRIC, INC.	)
	)
Solicitation No. 489986-87-B-0521	) P.S. Protest No. 87-59

### DECISION

National Electric, Inc., (NEI) protests the actions of the contracting officer in conducting a procurement for PCB decontamination under Solicitation No. 489986-87-B-0521. NEI's protest, which is dated May 7, 1987, was received by the contracting officer on May 8. The contracting officer has referred NEI's protest to this office pursuant to Postal Contracting Manual (PCM) 2-407.8 e.

#### Background

Solicitation No. 489986-87-B-0521, issued by the Dallas Facilities Service Office on April 1, 1987, invited bids for the decontamination of the Page Belcher Federal Building in Tulsa, Oklahoma. Bid opening was scheduled for 3:00 p.m. on April 20. The solicitation was amended twice. The first amendment was issued April 9 and the second April 15; neither amendment altered the schedule for the opening of bids.

NEI protests the issuance of Amendment No. 2 three working days before bid opening, arguing that, contrary to the requirements of PCM 2-207, the contracting officer failed to consider bidders' needs for additional time to consider the amendment and modify their bids accordingly. NEI further argues that the amendment was unfair, in that it was labeled a clarification, but actually effected a change in the work required by the specifications. While the original specifications required only cleaning of certain ductwork, Amendment No. 2 stated that such ductwork should be replaced.

NEI also objects to the requirement in the solicitation that the contractor furnish performance and payment bonds. It asserts that such bonding requirements are typically required for construction contracts, a classification it considers inappropriate for the type of work called for in the solicitation. NEI argues that these requirements are not only unnecessary but also unreasonable, because the required bonds would be "practically impossible to obtain." It expresses concern that the successful bidder will attempt to reduce the bonding requirements through post-award negotiations.

In his report, the contracting officer asserts that NEI is not an interested party, by virtue

of its stated inability to secure a bid or performance bond for the project. As to NEI's objections to the terms of the solicitation, the contracting officer argues that the protest is untimely, as it was filed after bid opening and more than 10 working days after the issuance of the second, and final, amendment to the solicitation. As to the shift in requirements from cleaning ductwork to replacing it, the contracting officer also reports that an analysis by postal engineers indicates that the change would reduce the cost of performance.

The contracting officer also defends the categorization of the contract work as construction, and the imposition of Davis-Bacon and bonding requirements. He also points out that these requirements were equally applicable to all bidders. He notes that, despite the protester's assertion that the required bonds were virtually impossible to obtain, four of five bidders submitted the required bid bonds.

In its response to the contracting officer's report, NEI questions the ability of the successful bidder to obtain the required performance bond, notwithstanding its submission of the bid bond required by the solicitation. NEI suggests that the required performance bond would exceed the bonding limits of the successful bidder's surety. NEI also argues that its failure to furnish the required bid bond should not be determinative, as it has raised a question about the ability of any bidder to comply with the requirements of the solicitation.

Comments in opposition to NEI's protest were filed on behalf of Ensco Environmental Services, Inc. (Ensco). Ensco notes a strong parallel between the instant protest and an earlier protest filed by BMS Technologies, Inc.; it incorporates comments submitted in response to that protest. Ensco also argues that NEI should have raised its objections to the bonding requirements before bids were due.

## Discussion

As Ensco observed in its comments, this protest is essentially similar to an earlier protest. See BMS Technologies, Inc., P.S. Protest No. 87-32, May 29, 1987. NEI does not pursue the Davis-Bacon Act issue raised in the earlier protest, but does press more strongly its opposition to the solicitation's requirement of performance and payment bonds. Although it states its protest as one against award, NEI's arguments relate exclusively to the terms of the solicitation. Even NEI's argument that bonding requirements could be reduced in post-award negotiations is, at bottom, an argument that the requirements in the solicitation were excessive.<sup>1/</sup> For the reasons stated in BMS Technologies, Inc., supra, we conclude that NEI's protest is untimely under PCM 2-407.8 d. (1).

<sup>1/</sup>Even if the Postal Service and the successful bidder were to agree to a reduction or elimination of the bonding requirements, that development would suggest nothing more than that the terms of the solicitation should have been, but were not, protested prior to bid opening. Any failure by the successful bidder to supply the required bonds is a matter of contract performance not appropriate for consideration in a bid protest decision. Cf. Jarke Corporation, P. S. Protest No. 87-33, May 20, 1987.

The protest is dismissed.

**[Signed "Norman D.  
Menegat for"]**

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[Compared to original]**